

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

W.6 Restaurant Group Ltd., d/b/a The Barley)	CASE NO. 1:17-cv-02521
House of Cleveland, et al.)	
)	JUDGE DAN A. POLSTER
Plaintiffs,)	
)	
-vs-)	<u>MOTION TO STRIKE</u>
)	<u>DECLARATION OF SCOTT J.</u>
Richard Bengtson, et al.)	<u>SHOLDER IN SUPPORT OF MOTION</u>
)	<u>TO DISSOLVE TEMPORARY</u>
Defendants.)	<u>RESTRAINING ORDER [DOC. # 6]</u>
)	

Plaintiffs, W.6 Restaurant Group Ltd., d/b/a The Barley House of Cleveland (“Barley House”) and Richie Madison (“Madison”), by and through undersigned counsel, respectfully move the Court for an Order striking the errantly filed Declaration of Scott J. Sholder in Support of Motion to Dissolve Temporary Restraining Order [Doc. # 6].

The Declaration of Attorney Sholder demonstrates a blatant disregard for the rules of evidence and procedure and calls into question whether Attorney Sholder should be disqualified due to his self-inflicted role as a fact witness in this matter. *See, e.g., In re Mackey*, No. 09-30996, 2013 WL 392449 at *2 (Bankr. N.D. Ohio) (striking attorney affidavit because the attorney was “not competent to testify at trial and his averments in his affidavit cannot be presented as admissible testimony at trial”).)

For example, paragraphs 2 through 4 simply present improper attorney argument (e.g. “In further support of Defendants’ contention that their livelihoods are being, and will continue to be, significantly and irreparably harmed by the issuance of the TRO – an unconstitutional prior restraint on speech”), which of course is not evidence. *Procter & Gamble Co. v. Team Techs., Inc.*, 46 F.Supp.3d 764, 772 (S.D.Ohio 2014) (“attorney argument is not evidence”). Paragraphs

2 through 4 also regurgitate the contents of an unverified letter from a third-party attached to the Declaration as Exhibit “1.” That letter is nothing more than inadmissible hearsay, and Attorney Sholder’s further commentary on the same is hearsay upon hearsay. *See, e.g., Wilson v. Dubel*, No. 3:05-CV-325, 2006 WL 783355 at *3 (S.D. Ohio) (“In examining the . . . Affidavit, the Court finds the Motion to Strike well taken in that it contains facts of which the Plaintiff does not have personal knowledge (that is knowledge to which he could testify from personal observation as required by Fed. R. Evid. 602). . . [and] hearsay * * * * The Motion to Strike is accordingly granted.”

In paragraph 5, Attorney Sholder further injects himself as a fact witness in this case subject to discovery and deposition by providing the following commentary on and regarding Exhibit “2” to his Declaration:

- With support from an unknown screenshot on Doc. # 6-2 at PageID # 102, Attorney Sholder avers that “plaintiff Richie Madison even appears to be saying ‘banks You’re f*cked’.” *See* Declaration [Doc. # 6] at ¶5.

In fact, that is a screenshot of Defendant Richard Bengtson threatening Plaintiff Richie Madison that “You’re fucked.” See Doc. # 1-2 at PageID # 35. Regardless, Attorney Sholder will need to be deposed as to his averment.

- Citing to Doc. # 6-2, Attorney Sholder injects the following inappropriate attorney argument: “In further support of Defendants’ contention that Plaintiffs in this action are purposely exploiting the TRO in an effort to smear Defendants knowing that Defendants are unable to respond in their own defense in light of the prior restraint Plaintiffs unconstitutionally procured – and presumably to increase their own exposure for pecuniary gain” *See* Declaration [Doc. # 6] at ¶5.

Again, attorney argument is not evidence.

- Finally, Attorney Sholder avers that “attached hereto as Exhibit 2 are true and complete screen captures of several examples of sponsored social media posts and paid advertisements by Plaintiffs concerning the events leading up to the issuance of the TRO, which contain false, misleading, and damaging accusations concerning Defendants and which were posted after the issuance of the TRO.” *See* Declaration [Doc. # 6] at ¶5.

How does Attorney Sholder know these are true and complete screen captures? How does Attorney Sholder know that the screen captures are sponsored social media posts and paid advertisements allegedly paid for by Plaintiffs? How does Attorney Sholder know that the screen captures “contain false, misleading, and damaging accusations concerning Defendants and which were posted after the issuance of the TRO?” Attorney Sholder will need to be deposed as to these averments.

In short, it is more than likely that Attorney Sholder has now inserted himself in this matter and is subject to discovery and deposition. Nothing in the Declaration is of any probative value to the primary issue faced by this Court: whether it maintains proper jurisdiction over this matter. As set forth in their Motion to Remand [Doc. # 5], the Court lacks jurisdiction due to the absence of complete diversity of citizenship among the parties.

WHEREFORE, for each and every one of the reasons discussed herein, and for all of them taken together, Plaintiffs respectfully move the Court for an Order striking the errantly filed Declaration of Scott J. Sholder in Support of Motion to Dissolve Temporary Restraining Order [Doc. # 6].

Respectfully submitted,

/s/ Christopher B. Congeni

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Christopher B. Congeni

Counsel for Plaintiffs

LOCAL RULE 7.1(f) CERTIFICATION

I hereby certify that the foregoing above-captioned case pending in the United States District Court, Northern District of Ohio, Eastern Division, is on an unassigned track, and that the foregoing complies with all requirements of Local Rule 7.1(f).

/s/ Christopher B. Congeni

Counsel for Plaintiffs